Supreme Court, U.S.
FILED
MAR 2 2 2004
OFFICE OF THE CLERK

No. 03-1174

IN THE

Supreme Court of the United States

MICHELLE NORTON and JOHN NORTON, JR.,

Petitioners,

v.

DEBORAH HALL
COUNTY OF CUMBERLAND
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR RESPONDENT DEBORAH HALL

PETER T. MARCHESI
WHEELER & AREY, P.A.
Attorneys for Respondent Deborah Hall
27 Temple Street
P.O. Box 376
Waterville, Maine 04903
(207) 873-7771

186520

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QUESTIONS PRESENTED

I. WHETHER IMMUNITY PROVISIONS OF MAINE'S TORT CLAIMS LAW IMPLICATE THE DUE PROCESS CLAUSE OR THE JUST COMPENSATION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II. WHETHER THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO A SUBSTANTIVE DUE PROCESS CLAIM WHERE THE DEFENDANT POLICE OFFICER WAS ENGAGED IN AN EMERGENCY RESPONSE REQUIRING QUICK ACTION WITH NO OPPORTUNITY FOR DELIBERATION?

III. WHETHER A REASONABLE POLICE OFFICER WOULD HAVE KNOWN, IN 1998, THAT A HIGH SPEED EMERGENCY RESPONSE TO A CALL INVOLVING THE WELFARE OF A SIX YEAR OLD CHILD WOULD VIOLATE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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K. Blum, *Qualified Immunity: A User's Manual*, 26 Ind. L.Rev. 187 (1993) 18

STATEMENT OF THE CASE

Petitioners' Statement of the Facts is so selective and skewed as to require Respondent Hall to address what amount to misstatements of fact, by omission. *See* Supreme Court Rule 15(2).

On July 8, 1998, Respondent Hall received a call from dispatch requesting her to respond to a call for assistance involving an out of control six year old child. Deposition of Deborah Hall, pp. 156-57 (hereafter "Hall dep., p.__").[1] Hall was told that "rescue is standing by – would be standing by until my arrival." Hall dep., p. 168. Based upon her experience, Hall believed that there was a serious emergency involving the welfare of a six year old child which required her immediate presence at the scene before the rescue unit would respond. Hall dep., p. 166. Hall believed that rescue personnel knew of the situation and believed that rescue would not respond until she reached the scene and secured the scene. Hall dep., pp. 167, 169. Hall was familiar with the location of the call based upon her prior experience in responding to calls both at that residence and in dealing with a particular individual who resided there. Hall dep., pp. 171, 223-24. When Hall had previously responded to the location in question, the calls involved physical violence, alcohol, and general combativeness. Hall dep., p. 224. Based upon all of this information, Hall believed that there was an emergency involving the welfare of a six year old child which required her immediate presence before the rescue unit would respond to assist the child. Hall dep.,

1. Petitioners did not include in the appendices to the Petition those portions of the record cited herein. Each reference to the record herein was properly a part of the record below.

p. 166. Hall's supervisor also responded to the call on an emergency basis. Hall dep., pp. 171-72.

Hall used both her emergency lights and siren when responding to the call. Hall dep., p. 162. State law only requires use of a siren "when reasonably necessary to warn . . . other operators of the vehicle's approach." 29-A M.R.S.A. § 2054(6). Hall had been trained to silence her siren when receiving radio transmissions in order to ensure clear communications. Hall dep., pp. 123-24. As Hall engaged in her response, she received the beginning of a radio transmission from dispatch. Hall dep., p. 180. While keeping her eyes on the road, Hall reached to her lap to pick up her radio microphone in order to respond to the transmission from dispatch. Hall dep., p. 180. She does not recall whether or not she exercised her discretion to silence her siren at any point in this particular emergency response. Hall dep., pp. 123-24. At the same moment, Petitioners' vehicle made a left hand turn in front of Hall. Hall dep., p. 174. Hall attempted evasive maneuvers to avoid the accident, but was unsuccessful. Hall dep., p. 180.

Hall had and exercised the discretion to initiate an emergency response. *Cumberland County Sheriff's Office Field Services Manual*, General Order 2-17(B)(C)(1); *Deposition of Mark Dion, Sheriff of Cumberland County,* pp. 99-102. Based upon the totality of the circumstances, Hall believed that an emergency response was required: . . .

> What I explained as to having a six year old child up at that time of night and knowing the name of the residence that I was going to and their past history and the fact that rescue was standing by and was not going to go to the residence until I

> arrived there along with the fact that the supervisor was also responding to the scene as well as myself as a second unit [,] that led me to believe that there was much more to the story than a six year old that for some reason two parents can't control at 10:00 at night.

Hall dep., pp. 171-72.

REASONS FOR DENYING THE PETITION

I. THE IMMUNITY PROVISIONS OF THE MAINE TORT CLAIMS ACT DO NOT RENDER THE ACT UNCONSTITUTIONAL UNDER A PROCEDURAL DUE PROCESS ANALYSIS OR UNDER THE TAKINGS CLAUSE.

Petitioners contend that they were deprived of property interests without compensation or post deprivation remedy, and that the eventual absence of a remedy under the Maine Tort Claims Act renders that Act unconstitutional. Petitioners apparently misapprehend the *Parratt-Hudson* doctrine and argue unpersuasively that the court's holdings in *Parratt v. Taylor*, 451 U.S. 527 (1991) and *Hudson v. Palmer*, 468 U.S. 517 (1984), render the Act unconstitutional in light of its immunity provisions. *See* App. E, pp. 38a-39a. The fundamental flaw in Petitioners' invocation of the *Parratt-Hudson* doctrine is that the doctrine is defensive in nature. Specifically, it is used to defeat procedural due process claims under 42 U.S.C. § 1983 by demonstrating the existence of an adequate remedy at state law. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984). The doctrine is also inapplicable here because there is no viable procedural due process claim,

because there was no random and unauthorized conduct, and because Maine's tort claim law provides an adequate remedy.[2]

A. *The Parrott-Hudson Doctrine Applies Only To Procedural Due Process Claims.*

The *Parratt-Hudson* doctrine applies only to procedural due process claims. *Zinermon v. Burch*, 494 U.S. 113, 129 (1990). It is difficult to appreciate a viable procedural due process claim here. The touchstone of such a claim is not the deprivation itself, but that the deprivation occurred without an adequate remedy in the form of some process to safeguard against an improper deprivation. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 710 (1999); *Zinermon v. Burch*, 494 U.S. at 125. As will be demonstrated below, the statutory scheme which Petitioners attack itself provides an adequate remedy. As a threshold matter, however, because of the availability of a *substantive* due process claim, immunity provisions of the state law which ultimately defeat Petitioners' state *tort* claims, do not procedurally deprive Petitioners of an opportunity to present constitutional claims. *See e.g. County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Woodson v. North Carolina*, 428 U.S. 280 (1976). There is no procedural due process issue here, and Petitioners reliance on *Parratt-Hudson* is ill-founded.

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2. Petitioners blend concepts of procedural due process with notions of unconstitutional takings absent just compensation. *See* Petition at 10-11. The resulting amalgam blurs these distinct constitutional principles to the point that they are barely recognizable. To the extent that Petitioners contend that the lack of a post deprivation remedy is an issue with respect to their argument under the takings clause, then the discussion below, *infra* at section (I)(C), p. 5, with respect to the adequacy of the remedy afforded by the state statutory scheme is applicable both to the procedural due process considerations under the *Parratt-Hudson* doctrine and to the takings claim.

B. *The Parrott-Hudson Doctrine Requires "Random And Unauthorized" Conduct.*

Petitioners also fail to recognize that the *Parratt-Hudson* doctrine only applies when there has been random and unauthorized conduct. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The *Logan* court emphasized that the *Parratt-Hudson* doctrine is limited to cases which involve "a random and unauthorized act by a state employee . . . , not a result of some established state procedure." *Logan v. Zimmerman Brush Co.*, at 435-36. To the extent that Petitioners claim a property interest in a cause of action against Respondent Hall, the deprivation of that interest was pursuant to statute, and was not a random or unauthorized act. And if Petitioners' claim is for deprivation of their decedents' interest in "life" as a result of Respondent Hall's actions, those actions were expressly authorized by statute, 30-A M.R.S.A. §§ 451(13), 452; 29-A M.R.S.A. § 2054, and by departmental regulation. *See supra*, p. 2.

C. *Maine's Tort Claim Law Provides An "Adequate" Remedy, And States Retain The Authority To Place Limitations On Property Rights Which They Create.*

1. Maine's tort claims statute provides an "adequate" remedy.

Even if the *Parratt-Hudson* doctrine were to apply, Petitioners were not left without an adequate state remedy. This Court has previously recognized that aspects of a State statutory tort scheme which provide immunity defenses do not necessarily render the remedy inadequate, even though they may work to deny recovery in individual cases. In *Daniels v. Williams*, 474 U.S. 327 (1986), Justice Stevens expressed the view

that immunity under a state tort statute is not necessarily unconstitutional:

> Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, . . . the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate.

Daniels v. Williams, 474 U.S. 327, 342 (1986) (Stevens, J. concurring). While there may be a meaningful distinction between an immunity defense that is a *per se* bar to all claims and an immunity defense that might preclude certain claims on a case by case basis, where the latter category of immunity defenses is at issue – as it is here – this Court's precedent indicates that notwithstanding the immunity defense, the statutory scheme nevertheless provides an adequate remedy.

Most lower courts confronted with this issue have also held that the mere fact that a state law immunity provision might deprive a plaintiff of a potential remedy does not render the state remedy inadequate or unconstitutional. *Easterhouse v. Felder*, 879 F.2d 1458, 1475 (7th Cir. 1989) (*en banc*) (availability of qualified immunity defense does not render state remedy inadequate), *vacated and remanded*, 494 U.S. 1014 (1990); *Taylor v. Leadbetter*, 791 F.2d 881, 884

(11th Cir. 1986), *cert denied*, 489 U.S. 1065 (1989); *National Communication System v. Michigan Pub. Serve. Comm'n*, 789 F.2d 370 (6th Cir. 1986) (availability of good faith immunity did not render state remedy inadequate), *cert denied*, 479 U.S. 852 (1986); *Juncker v. Tinney*, 549 F. Supp. 574 (D.Md. 1982) (qualified immunity does not render state remedy inadequate).

2. States retain the authority to create property interests, and to place rational, policy based limitations on those interests.

(a) Maine's tort immunity law is not "state action" causing a deprivation of life.

In *Martinez v. California*, 444 U.S. 277 (1980), the court addressed a challenge to a state statutory tort scheme which provided immunity to the state actor. The court considered whether the immunity provision might be unconstitutional if it caused the deprivation. In rejecting the due process challenge to the statute, the court concluded that the immunity provision did not render the state tort law violative of the due process clause by virtue of the fact that the immunity provision might have marginally increased the likelihood of a deprivation. The *Martinez* court wrote that:

> This statute merely provides a defense to potential state tort-law liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might.

Martinez v. California, 444 U.S. 277, 281 (1980). Here, as in *Martinez*, the fact that Defendant Hall was granted

immunity from liability arising from discretionary acts might arguably have diminished her inhibition to operate her vehicle at a high rate of speed. The *Martinez* court recognized that "a legislative decision that has an incremental impact on the probability that death will occur in any given situation . . . cannot be characterized as state action depriving a person of life . . .". *Id.* at 281. There is no colorable argument that the immunity provision caused an unconstitutional deprivation of life.

(b) Maine's tort immunity law does not constitute an unconstitutional statutory deprivation of a state created property interest in a cause of action.

The *Martinez* court also addressed the alleged due process violation arising not from the taking of a life, but from the denial of a cause of action:

> Nor can a statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the due process clause. In that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning it's owns rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting

> the individual citizen from state action is wholly arbitrary or irrational.[3]

Martinez at 281-82 (internal footnote omitted). This Court has emphasized the deference to be accorded state legislatures in fashioning state tort law statutes. The only requirement is that there be a rational relationship between the State's policy interests and the statute. The *Martinez* court wrote that:

> We have no difficulty in accepting California's conclusion that there is a rational relationship between the State's purposes and the statute. In fashioning state policy in a practical and troublesome area like this, the California Legislature could reasonably conclude the judicial review of a parole officer's decisions would inhibit the exercise of discretion. That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is

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3. To the extent that the conduct at issue here was "wholly arbitrary or irrational," it would implicate notions of *substantive* due process. *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

> unconstitutional when applied to defeat a tort claim arising under state law.

Martinez at 282-83 (internal quotations and citations omitted). Here, precisely the same considerations were at issue when the Maine Legislature implemented the immunity provisions contained in Maine's Tort Claims Act. The statement of fact adopted by the Legislature when it implemented the provisions providing discretionary function immunity to governmental employees provides:

> [I]t bears emphasis that the immunities contained in Title 14, Section 8111, are intended to serve important governmental purposes. Government officials are frequently required as part of their jobs to take actions that have serious consequences for the individuals affected. Obvious examples are the actions of law enforcement officers investigating crimes .... If these government officials were faced with the constant possibility of personal liability, the inevitable result would be that they will be hesitant to take necessary enforcement action and the public interest would suffer.

L.D. 2443, Statement of Fact at 15 (113th Legis. 1987), at App. A, pp. 8a-9a.

This Court's oblique reference to the question of whether an immunity provision in a state post deprivation procedure could ever constitute a denial of due process does not assist Petitioners' arguments. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the court simply observed that the respondents in that case were not arguing that they were

denied due process by virtue of an immunity provision contained in California's tort statute. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 n.4 (1998). The court did not in any way suggest that such an argument would have merit. In fact, the citation to Justice Kennedy's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), suggests the contrary. In *Albright*, Justice Kennedy wrote:

> The commonsense teaching of *Parratt* is that some questions of property, contract and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under color of law into a violation of the Fourteenth Amendment cognizable under § 1983 . . . . Presumably, under this rationale any party who is involved in *nothing more than an automobile accident* with a state official could allege a constitutional violation under § 1983. Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states . . . .

Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring) (emphasis added).

Petitioners' attack on the constitutionality of the immunity provisions of Maine's Tort Claims Act fail for all of the foregoing reasons. Because the decision of Maine's Supreme Court is not in conflict with any other state court

of last resort, or with any prior decision of this Court, there is no occasion to issue a writ of certiorari on the grounds that the immunity provisions of Maine's Tort Claims Act fail to pass constitutional muster. *See* Supreme Court Rule 10.

II. THE STATE COURT CORRECTLY CONCLUDED THAT THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO SUBSTANTIVE DUE PROCESS CLAIMS ARISING OUT OF HIGH SPEED OPERATION OF POLICE VEHICLES DURING EMERGENCY RESPONSES.

Petitioners' challenge to that portion of the State court's decision holding that the "shocks the conscience" standard applies to substantive due process claims arising out of the high speed operation of police vehicles during emergency responses fails for two reasons: (1) it ignores the fact that the holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) applies as a matter of law to all cases where law enforcement personnel operate police vehicles at high speeds in emergency situations, and (2) it is premised on a challenge to the application of a properly stated rule of law. Such challenges rarely constitute the basis for the issuance for a writ of certiorari. Supreme Court Rule 10.

A. *The State Court Correctly Applied The "Shocks The Conscience" Standard In Analyzing Petitioners' Due Process Claims Where Respondent Hall Was Required To Make Split Second Judgments With No Opportunity For Recourse.*

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court held that:

> high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983.

County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998). In reaching that conclusion, the court recognized that emergent law enforcement action is often undertaken "in haste, under pressure, and frequently without the luxury of a second chance." *County of Sacramento* at 853 (internal citation and quotations omitted). The court required that in order for a law enforcement officer operating under such circumstances to be liable under § 1983, the officer must "shock the conscience" as evidenced by an *intent to harm*. *Id.* at 854. Petitioners urge that this Court's decision in *County of Sacramento* is limited to circumstances involving a "high-speed automobile chase aimed at apprehending a suspected offender." Petition at 15. Petitioners further urge that the holding in *County of Sacramento* was limited to the circumstances of that case, petition at 16, and that the mid-level "deliberate indifference" standard adheres in emergency response cases, because, Petitioners say, there is an "opportunity to deliberate". *Id.* Finally, in perhaps the most ironic twist, Petitioners contend that even if the "shocks the

conscience" standard applies here, even though there is no evidence indicating that Respondent Hall intended any harm, the facts are still sufficient to require a trial on that issue. Petition at 17. Petitioners simply misapprehend the holding in *County of Sacramento*.

First, the holding in *County of Sacramento*, although rendered in a case involving a police pursuit, was in no way limited to the precise facts of that case. Rather, the court reiterated its earlier teachings that where police are faced with circumstances "calling for fast action [and] have obligations that tend to tug against each other," and where the police "are supposed to act decisively and to show restraint at the same moment, . . . [making] their decision . . . in haste, under pressure, and frequently without the luxury of a second chance," liability under the Fourteenth Amendment will not lie in the absence of intent to harm for reasons unrelated to legitimate law enforcement purposes. *County of Sacramento* at 853. In reaching its holding, the *County of Sacramento* court likened the law enforcement officer's emergency pursuit to the circumstances facing a prison official in a riot. *Id.* To somehow tease out a distinction between police officers engaged in a high speed chase, from police officers engaged in a high speed emergency response, is inconsistent with the rationale underlying the holding in *County of Sacramento*. Whether engaged in a high speed chase as in *County of Sacramento*, or a high speed emergency response as here, the police are required to make split second decisions based upon instinct.

Here, Hall instinctively believed that something far more sinister was afoot than a six year old child who would not go to bed. The police normally do not receive calls from parents whose children who will not go to bed, particularly six year

old children at 10:00 P.M. She was familiar not only with the location of the call, but also the residents who frequented and resided at that location. She was aware that alcohol and violence were commonplace, having responded only weeks before to the same location to a call involving a violent crime. Furthermore, Hall was made aware that rescue was standing by, meaning to her that there was some sort of personal injury requiring the presence of a rescue unit, but that the rescue unit would not respond until the police advised that the scene was secure. Moreover, Hall's own supervisor was responding the call, and was doing so on an emergency basis.

These facts are the sort of "unforseen circumstances [that] demand an officer's instant judgment." *County of Sacramento* at 853. Notwithstanding Petitioners' argument to the contrary, the "shocks the conscience" standard is as applicable to cases involving emergency responses as it is to cases involving emergency pursuits. Any fair reading of *County of Sacramento* reveals that the holding was intended to apply to all situations where government officials are required to make quick decisions under rapidly evolving circumstances where there are competing considerations. The distinction which Petitioners attempt to make is that, when pursuing a vehicle, the operator of the police vehicle is faced with more split-second decisions than is the operator of a police vehicle when responding to an emergency call.

The distinction is one without a difference. Each operator is driving a motor vehicle in difficult, tense and rapidly evolving circumstances. Whether one situation provides more or less opportunity for "deliberation" than another is immaterial. There are clearly circumstances when an emergency pursuit of a vehicle is arguably unnecessary, and other circumstances where, even if pursuit is necessary, the

officer might not be faced with the vagaries of traffic, pedestrians, etc. (for example, on an isolated stretch of desert highway). And there can be no doubt but that there are circumstances under which an emergency response is more stressful and requires more quick decisions on the part of the law enforcement officer than an emergency pursuit.

This Court chose to avoid such individualized inquires, and established a bright line rule whereby liability under the Fourteenth Amendment will not be fastened upon a police officer for actions taken in response to an emergency, absent subjective intent to harm the victim for purposes unrelated to legitimate law enforcement considerations. *County of Sacramento* at 854. Petitioners' suggestion that Respondent Hall's conduct should be evaluated under the mid-level "deliberate indifference" standard is rejected perforce by the holding in *County of Sacramento*.

B. ***In Order To "Shock The Conscience," There Must Be Evidence That The State Actor Intended To Harm The Victim For Purposes Not Related To Legitimate Law Enforcement Activities.***

In implicit recognition that the "shocks the conscience" standard applies to the facts of this case, Petitioners contend that Respondent Hall's conduct meets that standard. Petition at 17. The problem with Petitioners' argument in this particular is that the phrase "shocks the conscience" as used in substantive due process parlance has a specific meaning: the conduct must have been undertaken for the purpose of harming the victim for reasons not related to legitimate law enforcement activities. *County of Sacramento* at 854. Petitioners use the phrase more generically, suggesting that Hall made poor judgments in treating the call as an

emergency and responding as she did, and that under the circumstances her conduct is shocking to the conscience.

While individuals' particular sensitivities and peculiarities may lead one person's conscience to be shocked by the same set of facts which merely trifles another's, the question is not whether a given individual's conscience (or the collective conscience of a jury) is shocked, but rather whether there is evidence that the actor intended to harm the victim for illegitimate purposes. *Id.* In the absence of such evidence, there is no substantive due process claim as a matter of law. Petitioners' arguments to the contrary are unavailing.

C. *Petitioners' Disagreement With The State Court's Application Of A Properly Stated Rule Of Law Does Not Provide An Appropriate Basis On Which To Issue A Writ Of Certiorari.*

Petitioners argue at length that the facts demonstrate that Hall had an opportunity to deliberate, that she failed to do so, and that her actions were reckless and unjustified. *See* Petition, pp. 17-20. The State court determined that, absent an intent to harm the victims, Petitioners' constitutional claim under the Fourteenth Amendment failed as a matter of law. Appendix A, p. 12 a. Notwithstanding all of the "facts" set forth in the Petition, the State court concluded that no trialworthy issue existed as to whether Hall was making an instantaneous decision with no opportunity for reflection, thus implicating the "shocks the conscience" standard. Disillusioned though Petitioners may be by this finding, it does not provide an appropriate basis upon which to issue the requested writ. *See* Supreme Court Rule 10.

III. EVEN IF A CONSTITUTIONAL VIOLATION EXISTED, RESPONDENT HALL IS ENTITLED TO QUALIFIED IMMUNITY.

Individual defendants in § 1983 actions are protected from liability where the constitutional rights at issue were not clearly established such that a reasonable person in the shoes of the defendant would have known that they existed. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Although there is some discontinuity in the approaches taken by different courts to determine whether or not a given constitutional right was "clearly established," *see* K. Blum, *Qualified Immunity: A User's Manual*, 26 Ind. L. Rev. 187, 202 (1993), it is clear that generally established constitutional norms do not suffice for demonstrating the existence of a "clearly established" constitutional right. Indeed, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the court wrote that:

> The right to due process of law is quite clearly established by the due process clause, and thus there is a sense in which any action which violates that clause (no matter how unclear it may be that the particular action is in violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights . . . . Our cases establish that the

> right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: *the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.*

Anderson v. Creighton 483 U.S. 635, 639-40 (1987) (emphasis added).

Petitioners contend that Respondent Hall's actions exceed her statutory authority, *see* petition, p. 21, yet they do not explain how. More importantly, Petitioners' reliance on the facts – as they view them – does not advance their cause. Even if one accepts as true that Hall knew that she was violating a state statute in some particular, that fact would not enter the constitutional calculus. In order to lose the shield of qualified immunity, Respondent Hall would had to have known that her conduct was violating another's *constitutional* right. In light of the holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), it is difficult to imagine how a police officer in Respondent Hall's position would have been on notice that her conduct ran afoul of the Fifth and Fourteenth Amendments. In a concurring opinion, Justice Stevens urged that when the constitutional landscape is unclear, such that it is difficult to discern whether a constitutional right has been violated, the qualified immunity analysis may leapfrog the first prong – the question of whether a constitutional right was violated – and proceed directly to the second prong, the question of whether a reasonable person in Respondent's position would have known that her actions violated the right. *County of Sacramento* at 859 (Stevens, J., concurring). This case

presents precisely that occasion. At a minimum, Hall was clearly entitled to qualified immunity, and there is no occasion to review the lower court's determination on certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER T. MARCHESI
WHEELER & AREY, P.A.
Attorneys for Respondent
Deborah Hall
27 Temple Street
P.O. Box 376
Waterville, Maine 04903
(207) 873-7771